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Taking on racial segregation: the European Court of Human Rights at a *Brown v. Board of Education* moment?

Dr. M.E.A. Goodwin*

On 13th November 2007, the European Court of Human Rights gave final judgement in the case of *D.H. and Others v. Czech Republic*.¹ As was widely anticipated, the Grand Chamber overturned the decision of the Second Section Chamber, and found by a 13-4 majority that the well-documented practice in the Czech Republic of assigning Romani children to so-called 'special schools' for children with mental deficiencies does in fact constitute a violation of Article 14 (the right to non-discrimination) in conjunction with Article 2 Protocol 1 (the right to education) of the Convention. In doing so, the Court appeared to have at last ceased to drag its feet in the area of non-discrimination and fully aligned itself with a progressive European normative framework that owes more to Luxembourg than Strasbourg.

A year further on, the Court has had further opportunity to focus minds upon the continuing existence within both the Council of Europe and the European Union of racial segregation in access to education, notably in *Oršuš and others v. Croatia* and *Sampanis and others v. Greece*. Does this jurisprudence add up to a decisive moment in European non-discrimination laws? Have we in Europe, more than 50 years after the most famous of American legal civil rights victories, at last reached our *Brown v. Board of Education* moment?

The question is important for a number of reasons. Firstly, it is important in terms of acknowledging the societal responsibility we bear towards a group that has been persecuted, misunderstood and maligned and to move towards achieving meaningful equality in access to education. Secondly, one could also argue that this case and what it reflects touches upon something fundamental of who we perceive ourselves to be, both as nationals belonging to an inter-governmental system and as Europeans (whatever that might mean) i.e. the issue of whether or not we are willing, via the mouthpiece of the Strasbourg Court, to tolerate and implicitly endorse racial segregation is important for what it says about us, in a similar way that *Brown v. Board of Education* and other steps in the U.S. civil rights movement said something fundamental about what America stood for. Thirdly,

more practically, this case touches upon the divergence in the European normative framework between Luxembourg and Strasbourg that the Chamber decision of *D.H. and Others v. Czech Republic* made so clear. While the European Court of Human Rights has explicitly recognised the sheer affront to human dignity represented by racial discrimination,² in the case of *D.H. and Others*, the Chamber chose to endorse a practice that clearly discriminated against Romani children in outcome if not in design. Finally, the link between treating children differently according to ability or need and separation on racial lines that these cases touch upon is an issue that affects all education systems, and is not one confined to Central Eastern Europe and the Balkans, nor to one particular ethnic group.

This comment will consider the Grand Chamber's reasoning in *D.H. and Others v. the Czech Republic* and attempt to assess this case in the light of earlier and subsequent jurisprudence. Does this case mark a turning point for the Court in its attitude to Article 14 or does it in fact form part of a pattern with earlier jurisprudence, the Chamber decision being then an aberrant verdict that has now been corrected? Have more recent judgments on the education of Romani children in Croatia and Greece seen the Court uphold or even further its verdict? It will consider the Court's decisions and reasoning in light of the historic 1954 US Supreme Court ruling.

1. *Brown v. Board of Education*

Before turning to examine the Strasbourg jurisprudence, it is worth recalling what it was that made the 1954 case of such momentous importance. Admittedly, the significance of *Brown* can be, and frequently has been, over-

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1. Grand Chamber Judgement of 13 November 2007, Application No. 57325/00.

2. As early as 1973, the Court recognised the special nature of racial discrimination in finding that direct racial discrimination could fall under Article 3 of the Convention and hence constitute inhuman and degrading treatment in the *East African Asians* case. More recently in *Nachova and others v. Bulgaria*, the Grand Chamber stressed the 'particular affront to human dignity' of racial discrimination; judgment 26 February 2004.

stated.³ But what this seminal case achieved was a clear and unequivocal statement by the Supreme Court of the evils of racial segregation. In the context of the Jim Crow laws that enforced the principle of 'separate but equal' laid down in *Plessy v. Ferguson*,⁴ the Supreme Court ruled in the context of the 14th amendment claim that separate could never be equal. This total *volte face* overturning their earlier precedent saw the Court find for the first time that segregation *itself* was injustice, and in doing so laid the path for segregation in all walks of life to be challenged, such as public transport, housing and access to public spaces.

In coming to this conclusion, Chief Justice Warren, in delivering the opinion of the Court in *Brown*, pronounced that, 'To separate them [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' In coming to this finding, the Court built on earlier considerations of the substantive content of an equal education. In *Brown* and in the series of cases leading up to it, the Court showed itself willing to rely upon intangibles when comparing facilities and in giving substantive content to quality in education. The Court noted in *Brown* that 'it [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' Similarly, in the earlier case of *Sweatt v. Painter*, the Court had ruled that it is 'those qualities which are incapable of objective measurement ... which make for greatness in a law school', therefore finding that the separate law faculties provided by Texas could not be considered as equivalent. In *McLaurin v. Oklahoma State Regents*, referred to by Warren in *Brown*, the Court, in considering the content of equal treatment, noted the importance of the applicant's 'ability to study, to engage in discussions and exchange views with other students'.⁵ For the Court, such considerations as those mentioned in *McLaurin* had an even greater impact upon children than young people.

While the *Brown* ruling opened the way for challenging segregation in other areas of life, the motivation behind the preparation of this case and the centrality which it held in the civil rights movement's strategy owes as much to the subject matter as to what it was challenging: education. The struggle for equal access to education was seen by generations of early civil rights activists as the key to achieving greater economic and political power, and thus equality in society.⁶ It was understood within the move-

ment that a denial of equal education was a deliberate means of perpetuating subjugation and of denying the emancipation from slavery that had been achieved on paper. Further, injustice in access to an equal education has an impact throughout the whole life of the individual children affected, in a way that facing discrimination in access to public spaces or housing does not. For both these systemic and individual reasons, education formed the focus of the civil rights litigation strategy. Indeed, the Court had already shown itself willing to protect equal opportunity in education in earlier decisions.⁷

In *Brown*, the Court made a profound statement about the importance of education in contemporary life that is worth recalling. On behalf of the full Court, Warren stated that, 'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.' He continued, 'It is the very foundation of good citizenship.' Moreover, Chief Justice Warren went on to consider the impact upon the individual child. He ruled, 'it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.'

It is both elements of *Brown v. Board of Education* – segregation *as* injustice and the sheer importance of education in achieving equality between groups in society and for individuals in making the most of themselves – that mark this case as one of the most seminal in twentieth century legal history. It was this that activists within the nascent Romani civil rights movement were hoping to replicate with *D.H. and Others v. Czech Republic*. Regardless of the success of the ruling in leading to *de facto* de-segregation, as the Supreme Court itself noted in *Brown*, one should not underestimate the importance of the law's refusal to give or lend legitimacy to segregation. *Brown* is remembered as much for its powerful moral statement as for any practical consequences that flowed from it.

Before turning to what the European Court of Human Rights chose to make of the opportunity to deny segregation that legitimacy, it is perhaps helpful to consider the jurisprudential context in which this Court had to rule.

2. The Strasbourg approach to non-discrimination

The European Court of Human Rights' approach to non-discrimination and thus to Article 14 of the Convention

3. For criticisms levelled at the over-emphasis on the importance of the legal strategy and its failure to address *de facto* segregation, see Stephen C. Halpern, *On the Limits of the Law. The Ironic Legacy of Title VI of the 1964 Civil Rights Act* (The John Hopkins University Press, 1995); for a negative comparison with the Romani civil rights approach, see M.E.A. Goodwin, 'White Knights on Chargers: Using the US Approach to Promote Romani Rights in Europe?', (2004) 5 *German Law Journal* 1431.

4. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

5. 347 U.S. 483, 494.

6. Halpern, *On the Limits of the Law*, 7-9.

7. In *State of Missouri ex rel. Gaines v. Canada* (305 U.S. 337 (1938)), the Supreme Court had ruled that the refusal by the State of Missouri to admit a black man to the public law school where no equivalent facility existed for African-Americans was available in-State was unconstitutional; and in *Sweatt v. Painter* (339 U.S. 629 (1948)), it ruled that Texas had failed to provide equal educational opportunities because the whites-only law school was ruled to be a better facility, despite the \$3 million upgrade to the separate black facility.

can be characterised at best as grudging.⁸ In contrast to other areas or rights under their purvey, and even taking the natural cautiousness of the institution into account, the Strasbourg Court has continually placed itself and its jurisprudence behind developments in non-discrimination law at the Member State, international and European Community level.⁹

Although the Court had shown itself willing to recognise the awfulness of racial discrimination as early as 1973 by placing such discrimination within the ambit of Article 3 (inhuman and degrading treatment),¹⁰ it took the Court until 2001 to accept the existence of indirect discrimination, in *Hugh Jordan v. the UK*.¹¹ Having recognised the existence of indirect discrimination, it then ruled out the use of statistics as a means of deducing the existence of indirect or disparate impact discrimination, despite the fact that the European Court of Justice has been allowing statistics to provide evidence of indirect gender discrimination since 1988.¹² It did relent slightly in *Hoogendijk v. the Netherlands*, but this was an admissibility decision and allowed only statistics that were 'undisputed' and 'official' to provide evidence of a difference in treatment.¹³

Similarly, the Court first considered the possibility of a shift in the burden of proof in the non-discrimination context in *Nachova v. Bulgaria* in 2004,¹⁴ long after it was standard practice both at the national level of European member states but also, again, within the jurisprudence of the ECJ;¹⁵ even then, the Grand Chamber ruling of 2005 overturned the substantive violation of Article 2 in conjunction with Article 14 on the basis that it was unreasonable to expect a government to disprove allegations that a violent act was motivated by racial prejudice. Instead the Grand Chamber issued a tepid statement that it could not exclude the possibility that it might require

governments to disprove allegations of discrimination under certain circumstances.¹⁶

This analytical approach was affirmed in *Bekos and Koutropoulos v. Greece*,¹⁷ in which Greece was found *inter alia* to have violated Article 14 in conjunction with Article 3 for the police beating suffered by two Romani men. Again the Court was only willing to offer a procedural violation for the failure to investigate adequately the allegation of racist motivation for the conduct and not a substantive finding of racist conduct. However, the concurring opinions, including one from Chamber President Bratza, suggested that there were those on the Court who were not impressed by the majority's timid approach.

The Court's hesitation in looking favourably upon non-discrimination applications is epitomised by the series of cases relating to Gypsy families and the restrictive UK land planning laws. Although it found in *Buckley v. the UK*¹⁸ that Gypsies following a traditional way of life had special needs, much to the delight of human rights advocates, it was not willing to actually find a breach of Article 8 or Article 14 in relation to the application of the UK's unfair planning laws. Subsequent test cases have met with a similar response: an acknowledgement of the special position of Gypsy families and the responsibility of the State to take special measures to meet their needs – going so far as to establish a positive obligation under Article 8 to facilitate the Gypsy way of life¹⁹ – but a refusal to accept that failure to do so breaches the Convention, even where the local authorities have themselves breached their statutory obligation to provide stopping facilities. The one successful application, *Connors v. the UK*,²⁰ concerned a procedural matter under Article 8, following the summary eviction of Mr. Connors and his family from a Council owned caravan site.

8. For an excellent guide to the Court's traditional approach to Article 14, see Janneke Gerards, 'The Application of Article 14 ECHR by the European Court of Human Rights', in Jan Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Brill, 2004), 3-60.

9. The principle of non-discrimination forms the bedrock of the UN human rights system; see, for example, the comprehensive definition and far-reaching obligations contained in the 1966 UN International Convention on the Elimination of All Forms of Racial Discrimination. Similarly, the principle of equality is deeply embedded in EC and EU law; see G. More, 'The Principle of Equal Treatment: from Market Unifier to Fundamental Right?' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999); also C. McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in S. Fredman (ed.), *Discrimination and Human Rights – the case of racism* (OUP, 2001).

10. *Op. cit.*, n. 2.

11. *Hugh Jordan*, judgement of 4 May 2001, (2003) 37 EHRR 2. Cf. the US Supreme Court's recognition of 'disparate impact' discrimination in 1971 in *Griggs v. Duke Power Co.*, 401 US 424; at the EC level, see *Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola* (Case 15/69) [1969] ECR 363 and *Sotgiu v. Deutsche Bundespost* (Case 152/73) [1974] ECR 153. See also Marianne Gijzen, *Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law* (Intersentia, 2006). For the argument that the concept emerged in international law in the inter-bellum period, see C. Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia, 2005).

12. The ECJ had recognised the concept of indirect discrimination in the Sabbatini case in 1971 (Case 32/71 *Sabbatini* [1972] ECR 345) and the necessity of statistics in proving it in *Danfoss* (Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 03199).

13. *Hoogendijk v. the Netherlands*, decision of 6 January 2005, Application No. 58641/00.

14. *Nachova v. Bulgaria*, judgment of 26 February 2004.

15. See Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607.

16. *Nachova v. Bulgaria*, Grand Chamber judgment 6 July 2005.

17. *Bekos and Koutropoulos v. Greece* [2005] ECHR 840; see also A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (OUP, 2nd ed. 2007), 827-828 for commentary on the cases.

18. *Buckley v. the UK*, judgment of 25 September 1996, Reports 1996-IV.

19. *Chapman v. the UK*, judgment of 21 January 2001, para. 95.

20. *Connors v. the UK*, judgment of 27 May 2004.

And yet in another sense the Strasbourg Court has shown itself to be unusually receptive to complaints from Roma in the last 10 years, suggesting a particular sensitivity to the enormity of the difficulties and discrimination that members of these communities face. Indeed, the Strasbourg Court is celebrated for its series of Romani cases, with victory in each case encouraging ever more applications.²¹ Success began for the institution driving the cases – the European Roma Rights Center – with *Assenov v. Bulgaria*,²² a case concerning the ill-treatment of a young Rom in police custody. Other victories were chalked up in *Conka v. Belgium*,²³ involving the illegal expulsion of Roma, the already-mentioned *Nachova v. Bulgaria*, concerning the almost certainly racially-motivated murder of two young Romani conscript soldiers, and in *Moldovan and Others v. Romania*,²⁴ a case relating to the Hădăreni pogrom made famous by the film *Gadjo Dilo* and Isabella Fonseca's novel, *Bury Me Standing*.²⁵ While these victories are rightly celebrated and have brought widespread attention to the plight of Romani communities across Europe, unlike the cases involving UK planning law or, indeed, that of *D.H. and Others v. Czech Republic*, these victories concerned cases that were outside the everyday experience of Roma. Although one could argue that abuse by both the police and the public, and the culpable neglect of the authorities, with which these cases dealt stemmed from the discriminatory environment in which Roma live, the actual events under examination were themselves not a part of systemic discrimination, an institutionalised and officially sanctioned part of the everyday in a way that planning laws and the education system are.

Moreover, the issue of segregation is not one with which the European post-war legal systems has dealt, presumably on the basis that there has been no need to do so or that, if indeed necessary, it could be addressed by either direct or indirect discrimination depending upon the nature of the cause. This lack is visible in the much-noted failure to include mention of segregation in the EC Race Directive,²⁶ and the subsequent efforts to galvanise support for a 'Romani Directive', in which the prohibition of segregation and appropriate measures to tackle it could be included.²⁷ This failure to mention the s-word arguably means that Europe is ill-placed to meet not just the chal-

lenges that the extreme marginalisation of Europe's Romani communities raise but also broader issues of institutional reactions to our multicultural societies.²⁸

Following in this trend, segregation was barely mentioned by the Strasbourg Court in the case that forced it to consider systemic racial discrimination beyond the setting of UK planning laws and in the much more emotive area of children and the right to education. *D.H. and Others* was set up as a direct counter-part to *Brown v. Board of Education*,²⁹ with the caveat that this case was based not upon clear *de jure* segregation along racial lines but upon the *de facto* segregation into schools for the mentally-disabled in a system where separate was anything but equal.

3. Endorsing segregation? *D.H. and Others*

3.1. The Facts of the case

This case, also known as the *Ostrava case* after the Czech town that forms its backdrop, concerns the challenge by eighteen Romani children born between 1985 and 1991 of their placement in a 'special school'. Under the terms of the relevant Czech legislation – section 31(1) of the Schools Act 1984³⁰ and Article 2(4) of Decree no. 127/1994³¹ – special schools exist for the education of children with 'mental deficiencies' that prevent them from following the curriculum of the ordinary schooling system. The applicants alleged that placement in these schools denied them their right to education on an equal footing with non-Romani children, and, as such, was racially discriminatory in impact.

The crux of their case was that as a result of questionnaires sent by the European Roma Rights Center – a pro-Romani organisation based in Budapest – to the headteachers of all schools in Ostrava, it was possible to establish, on the basis of their replies, that 50.3% of all Romani children in the town attended a special school, despite only constituting 5% of the town's overall school population. In comparison, only 1.8% of non-Romani children had been placed in a special school. As a consequence of these statistics, it was possible to calculate that any given Romani child was 27 times more likely to be labelled as having 'mental deficiencies' and placed outside the normal school system.

21. See Luke Clements, 'The Strasbourg Cases and Their Likely Long-Term Impact', (2006) 2/3 *Romani Rights*.

22. *Assenov v. Bulgaria* [1998] ECHR 98.

23. *Conka v. Belgium* (2002) 34 EHRR 54.

24. *Moldovan and Others v. Romania* (No. 2), judgment of 12 July 2005.

25. I. Fonseca, *Bury Me Standing: The Gypsies and Their Journey* (Vintage, 1996); *Gadjo Dilo* (1997) (directed by Tony Gatlif).

26. Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the 'Race Directive').

27. See the EU Network of Experts' 'Report on the Situation of Fundamental Rights in the European Union for 2003', in which they call for a Romani Integration Directive; available at <http://ec.europa.eu/justice_home/index_en.htm>.

28. See the 2008 released data from the UK Millennium Cohort Study, which strongly suggests that by the age of five, ethnicity appears to have a significant impact on a child's health, behaviour and cognitive abilities. All data available at the Centre for Longitudinal Studies website; <www.cls.ioe.ac.uk/studies.asp?section=000100020001>. Bite-sized analysis at BBC UK blog of 20 October 2008; available via archive at <www.bbc.co.uk/blogs/thereporters/markeaston/>.

29. For example, see the explicit parallel drawn by James Goldston, former ERRC Legal Director and Counsel to the applicants, J. Goldston, 'European Court to address racism in landmark cases', *Open Society Justice Initiative*, 28 February, available at <www.justiceinitiative.org/db/resources?res_id=102627>.

30. Law no. 29/1984, since repealed by Law no. 561/2004, which entered into force on 1 January 2005.

31. Decree no. 127/1997 on specialised schools, since repealed by Decree no. 73/2005, which came into force on 17 February 2005.

Established to cater for children with severe learning difficulties, special schools in the Czech Republic offered a severely reduced curriculum, and until a change in the law in 2000,³² children needed to have completed a normal primary school in order to continue on to secondary education. Secondary school and beyond was thus not available to the children in this case. Their only option beyond the age of 11 was vocational training.

A central element in the earlier Chamber decision, characterisation as requiring special schooling took place following an assessment by educational psychologists of the intellectual abilities of a given child and the decision of the respective head-teacher. The parents of a child need to give their consent according to the law before assignment or transfer to a special school can take place. They are informed by letter of the decision to place their child in a special school and of their right to appeal that decision. The parents of the children in this case had been sent the required letters and had not appealed the placement decision. It is also possible at any stage to contest a child's placement in special schooling, and a number of the parents in this case had taken advantage of this opportunity; as a consequence, their children were transferred into a normal school. The majority of parents chose not to do so.

3.2. *The second chamber's verdict*

The application was lodged with the European Court of Human Rights in 2000 following an unsuccessful challenge before the Czech Constitutional Court in 1999. The decision of the Second Chamber on 7 February 2006 was an extraordinary ruling.³³

In line with the Court's earlier reasoning in the *Belgian Linguistics Case*, the principle of equality as enshrined in Article 14 is breached where a difference in treatment has no legitimate aim and fails to demonstrate 'a reasonable relationship of proportionality' between that aim and the means employed.³⁴

The applicants, represented by the European Roma Rights Center, had argued, applying the Court's own test, that there was no 'reasonable and objective' justification for the statistical findings outlined above. A poor grasp of the Czech language or socio-economic family disadvantage could not, so it was argued, constitute reasonable and objective justification for the practice of condemning children to a vastly inferior education, being wholly disproportionate to the aim.³⁵ The applicants further argued that even where the Czech government could advance a legitimate aim for the practice, the evidence of gross racial disparity as an outcome of the means employed to achieve that aim could not be considered

proportionate. Moreover, the children of other language groups (for example, the children of Vietnamese or Polish families) or of disadvantaged families from other ethnic groups did not suffer the same disparity in placement, suggesting that there was no racially neutral explanation for the statistical difference in treatment between Romani and non-Romani children.

In response, the Czech government did not attempt to provide an explanation for the disparity, arguing instead that the existence of special schools pursued a legitimate aim, that the decision to place a child in a special school was taken in the best interests of the child, that it was done pursuant to a proper procedure administered by educational professionals and with the consent of the parents.³⁶

By a 6-1 majority, the second chamber found in favour of the government. The finding is less surprising than the reasoning the chamber adopted. The Court accepted the government's argument that the special schooling system was established pursuant to a legitimate aim of enabling children from all ethnic backgrounds with learning difficulties to obtain a basic education. It was thus not aimed specifically at Romani children (not a point actually claimed by the applicants).

In dealing with the seemingly compelling statistical evidence that demonstrated an overwhelming disproportionate effect of the placement mechanism on Romani children, and thus with the applicants argument that the measures adopted were disproportionate, the Court upheld earlier case-law. In line with its finding in *Hugh Jordan v. UK*,³⁷ the Court acknowledged that although a general policy may have disproportionately prejudicial effects on a particular group and thus be discriminatory in principle, statistical evidence was not sufficient on its own to establish this. Thus, the argument of indirect or disparate impact discrimination was swept aside.

In considering whether any difference in treatment may have been the result of prejudice, the Court considered the nature of the tests. They accepted that the tests were administered by professional educational psychologists. The Court held that it was not its role to look beyond the facts of the case in an attempt to establish that the individual psychologists involved in the testing of the applicants had made their decision on the basis of discriminatory attitudes towards Roma. Moreover, it found that the applicants had not successfully challenged the assessment of the tests and demonstrated that the children in the case did not in fact have learning disabilities, despite the Czech government's own admission in a report to the body overseeing the Framework Convention for the

32. Amendment no. 19/2000 to Law no. 29/1984 ('the Schools Act'), which came into force on 18 February 2000.

33. See for analysis of the first ruling, M.E.A. Goodwin, '*D.H. and Others v. Czech Republic*: a major set-back for the development of non-discrimination norms in Europe' (2006) 7 *German Law Journal* 421.

34. *Case 'relating to the certain aspects of the laws on the use of languages in education in Belgium' v. Belgium (Belgian Linguistics case)*, A6, p. 34, para. 10 (1968). The Court has repeated this test in, *inter alia*, *Marckx v. Belgium*, A31, p. 16, para. 33 (1979); *Rasmussen v. Denmark*, A87, p. 14, para. 38 (1984) and *Abdulaziz, Cabales and Balkandali v. UK*, A42 (1985).

35. Chamber decision, paras. 38-39.

36. *Ibid.*, para. 34.

37. *Op cit.*, n. 9.

Protection of Minorities that the psychological tests frequently placed Romani children of above average intelligence in special schools because of the culturally specific nature of the tests.³⁸

As a final aspect of its reasoning, the Chamber put considerable weight upon the fact that a number of the children's parents in the present case had failed to lodge appeals to the decisions to place their children in special schools; and that where parents of some of the applicants had done so at a later stage, their children had in fact been transferred back into the normal school system. It also took note of the fact that some of the parents in the case had themselves requested the placement of their children in a special school. Thus, while finding that a Romani child's experience in the Czech education system was 'by no means perfect', the Chamber found that it was first and foremost the parents' responsibility – 'part of their natural duty' – to ensure that their children receive an education.³⁹

As a result of this reasoning, the Chamber felt unable to conclude that the placement of the applicants in special schools was the result of racial prejudice. The effect of this judgement was effectively to deny the existence of indirect racial discrimination, putting the Strasbourg Court in direct conflict not only with widely accepted global norms as enshrined in the various UN Conventions to combat various forms of discrimination, but more importantly, with European Union obligations enshrined *inter alia* in Directive 2000/43 EC. Moreover, the bench majority opted to blame the parents for any harm that their children may have suffered as a result of deeply entrenched systemic discrimination.

3.3. The Grand Chamber's decision

The Grand Chamber, having examined the question of exhaustion of domestic remedies in considerable detail, began by providing a clear contextualisation for their ruling, laying out what they understood to be the main principles at play.⁴⁰ The Court thus took the opportunity – as the applicants had suggested that they do – to make a clear statement about its position on non-discrimination in relation to its earlier case-law. This judgment, then, is a deliberate and considered opinion of the Court, one it knew would be widely reported and well studied. That this case represented a special opportunity for the Court was thus well understood.

The Court began by recapitulating its standard definition of discrimination as a difference in treatment between

persons in relevantly similar situations that lacks an objective and reasonable justification;⁴¹ equally, it repeated its earlier findings in, *inter alia*, *Hugh Jordan v. the UK* that a general policy or measure that has disproportionately prejudicial effects may constitute discrimination even where the measure is not specifically aimed at the group concerned.⁴² Further, following *Zarb Adami v. Malta*, a case decided in the interval between the Chamber verdict and the Grand Chamber hearing, the Court noted that discrimination in violation of the Convention may result from a *de facto* situation i.e. that intent is not required.⁴³

In terms of the ground at issue, the Court reiterated its recent line that 'racial discrimination is a particularly invidious kind of discrimination' with 'perilous consequences'. As such, and with the understanding that a democratic vision of society requires that diversity be seen not as a threat but as a source of enrichment, member states are required by the Convention to use 'all available means' to combat racism. Further, the Court reminded itself of its ruling in *Timishev v. Russia* (ignored by the Chamber), in which it held that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society'.⁴⁴

The Court reaffirmed its jurisprudence concerning the shifting of the burden of proof to the respondent government to establish an appropriate justification in situations where *prima facie* evidence of a Convention infringement is established. More at issue was the question of what constitutes appropriate evidence of a *prima facie* violation. In *Nachova and Others v. Bulgaria*,⁴⁵ the Court had already held that there were no procedural barriers to the admissibility of evidence and that proof may follow from the 'co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.⁴⁶ The Court also emphasised that it was established case-law that the level of proof or persuasion necessary to reach a certain conclusion depended upon the specificity of the facts and the Convention right at stake. These statements, taken together with its declarations both in *Nachova* and *Timishev* – repeated in the present case – of the evil of racial discrimination, suggest that the Court is willing to lower the barrier to establishing a *prima facie* case where the allegation is one of racial discrimination; nevertheless, it did not make this explicit.

However, it was the use of statistics that was primarily at issue in the present case. In two decisions, one decided

38. Report submitted 1 April 1999 pursuant to Article 25(1) of the Framework Convention for the Protection of National Minorities; Chamber judgment, para. 26.

39. Chamber judgment, paras. 51-52.

40. Paras. 175-181.

41. E.g. *Willis v. UK*, no. 36042/97, ECHR 2002-IV, para 48.

42. *Hugh Jordan v. UK*, paras. 105-109.

43. *Zarb Adami v. Malta*, judgment of 20 June 2006, para. 76. This ruling represents an explicit acknowledgment by a different section of the Chamber court (fourth section), in line with *Hugh Jordan*, of the existence of indirect discrimination, and could be read as a response to the decision of the second section in *D.H. and Others*.

44. *D.H. and Others*, decision 13 November 2007, para 176; *Timishev v. Russia*, judgment of 13 December 2005, [2005] ECHR 858.

45. *Nachova and Others v. Bulgaria*, both chamber and Grand Chamber decisions.

46. *D.H. and Others*, GC, para. 178.

in the interval between the two rulings, the afore-mentioned *Zarb Adami* and *Hoogendijk v. the Netherlands*,⁴⁷ the Court had already overturned its own earlier decision as to the inadmissibility of statistical evidence.

In applying the above cited principles to the facts of the case at hand, the Grand Chamber went further and found that where the allegation is one of indirect discrimination, effective protection of the rights contained in the Convention requires that less strict evidential rules should apply. The Court is not clear on what the standard is against which the evidentiary barrier is to be lowered but appears to imply from the subsequent paragraphs that lowering the barrier refers to the acceptance of statistical data. In its reasoning, the Grand Chamber allowed that statistics that proved to be 'reliable and significant' were sufficient to constitute *prima facie* evidence, and went on to find the statistics presented by the applicants met that standard. It should be noted that they were also uncontested in the present case, although it seems unlikely that the Court, albeit that it noted the fact that the Government had failed to contest the figures given, is developing a three-pronged test of reliable, significant and uncontested, although the latter may well come to influence determination of whether given statistics are reliable.

Following a shift of the burden of proof, the Court moved on to whether an objective and reasonable justification of the difference in treatment existed, noting that where the difference of treatment concerned race, colour or ethnic origin, the possible justifications will be interpreted as strictly as possible.⁴⁸

The Court found, *contra* to the second section, that the system of psychological testing could not provide objective and reasonable justification. In this, the Court took specific note of the Czech government's own admission that Romani children of above intelligence were often placed in special schools because they failed to take the specific circumstances of Romani children into consideration. It also appeared to place weight on the submission of third-party interveners and reports from European observers that the outcome of the psychological testing – i.e. the placement of Romani children in special schools by overwhelming margins – was 'quasi-automatic' and reflected the racial prejudices of society.⁴⁹ Further, the Court highlighted the lack of safeguards attending the schooling arrangements of Romani children reflecting the failure to pay sufficient attention to their special needs as members of a disadvantaged group, in effect linking back to earlier findings under Article 8 that governments

have special responsibilities towards Romani communities.⁵⁰

However, in order to overturn the section's judgment convincingly, the Grand Chamber needed to address the more awkward issue of whether parental consent provided justification. In coming to an opinion, the Court took note of the European Commission against Racism and Intolerance's opinion that Romani parents often consent to the channelling of their children into special schools in part in order to avoid abuse from non-Romani children and as a consequence of the continuing low degree of understanding of the long-term negative consequences of sending their children to such schools.⁵¹ Yet, what the Court did instead was conclude that it was not satisfied that the parents in this case, themselves poorly educated and as members of a disadvantaged minority, were capable of weighing up all the particulars of the situation. As consent in this situation could not be considered informed, as not given in full view of all the facts and consequences of the decision, it was not capable of waiving the applicants' rights.⁵² Ultimately, the parents were deemed incapable of giving their consent. The majority went on to find that the prohibition of racial discrimination was of such fundamental public importance that it would in any case not accept any waiver of the right not to be subject to racial discrimination.

In sum, the Grand Chamber found that the difference in treatment between Romani and non-Romani children was neither objectively justified nor proportionate in terms of the aims pursued and the means used. There were, however, four angry dissents that will be considered in the analysis below.

3.4. Analysis

In contrast with the Chamber's judgement of a mere 12 pages, the Grand Chamber's ruling stretches to a total of 61 pages. Although it would be too much on the basis of the number of pages alone to draw strong conclusions as to the seriousness with which the Court went at their task, there are other indications to suggest that the Court saw this case as being of vital importance in defining the Court and its purpose. While length is no test of quality, the Court felt the need to be very thorough. It heard third party interventions from Interights, Human Rights Watch, Minority Rights Group International, the European Network against Racism, the European Roma Information Office, International Step by Step Association, the Roma Education Fund, the European Early Childhood Education Research Association, and the Fédération internationale des ligues des droits de l'Homme. It took

47. *Hoogendijk v. the Netherlands*, op. cit. n. 34.

48. *D.H. and Others*, GC, para. 196.

49. *Ibid.*, para. 200. The 2000 report by the European Commission against Racism and Intolerance (ECRI) called the placement of Romani children in special schools 'quasi-automatic', para. 42. Similarly, the Court noted the report by the Commissioner for Human Rights, who found that 'the real criteria [for placement was] clearly ... their ethnic origin', para 43.

50. *Ibid.*, para. 207.

51. *Ibid.*, para 47.

52. *D.H. and Others*, decision 13 November 2007, para 203-204.

itself not just through Czech legislation, but went in detail in to Council of Europe instruments,⁵³ European Community instruments and case-law,⁵⁴ what it called 'Relevant United Nations Materials',⁵⁵ and other 'relevant material',⁵⁶ some of which it quoted at length. The outraged reaction to the parochialism of the chamber decision apparently moved the wider Court to demonstrate its learning.

The finding itself was not a surprise, in part because it followed the line of established case-law; arguably it was the Chamber that had taken a very narrow view. The 2006 judgment already seemed out of keeping then with the movement of the Court in giving more shape to Article 14. The reaffirmation of the shift on the use of statistical evidence places the Court fully in line with Luxembourg jurisprudence, even down to the explicit caveat that statistics, although accepted as evidence, are not necessary to meet the *prima facie* burden.⁵⁷ Yet, in deciding that statistics given as evidence of a breach must be 'reliable and significant' in order to activate the burden of proof shifting, the Court gives no guidance on what 'significant' might entail, only suggesting that it will depend upon the facts of the case and the importance of the right claimed. While the endorsement of the statistical evidence in *D.H. and Others* suggests that the barrier will not be high for cases involving racial discrimination – these statistics after all being generated from an NGO-compiled and distributed questionnaire, the same NGO as was acting for the applicants –, it is possible that a restrictive interpretation of 'significant' could become a new barrier for success in these types of cases.

Moreover, while the decision itself can only be welcomed, there are serious criticisms that can be levelled at the Grand Chamber's reasoning. Although a number can be made, such as the failure of the Court to examine whether the practice in fact constituted direct discrimination following the government's admission that the tests were not culturally neutral,⁵⁸ this analysis will focus on what the present author considers the most important in relation to judging the historical significance of the ruling.

34.1. An abandoning of the individual

The first significant criticism was highlighted by the dissenters on the bench, in particular in the dissent of Judge Jungwiert, but also in that of Judge Borrego Borrego. In explicitly avoiding the question of whether the individual applicants actually required special schooling on account of their individual abilities and/or learning difficulties, the Court relied for its finding on the statistical evidence that demonstrated that Romani children were placed in special schools by overwhelming margins; that is, it ignored the circumstances of the individuals and, in the words of Judge Jungwiert, 'set about evaluating and criticising a country's entire education system'.⁵⁹ The Court has long held that, as a supranational institution, it is not best placed to carry out fact-finding but must rely on the superior ability of the national courts to fulfil this role.⁶⁰ Indeed in this particular judgment, the Grand Chamber reminded itself of this self-imposed limitation and its need to focus on the individual applicants and not the overall social context, a task it judged better left to the Czech Constitutional Court.⁶¹ However, large sections of the judgment are in fact devoted to an assessment of the social context of the applications, from attempts to lay out the historical background of Roma in Europe –

53. Recommendation No. R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 69th meeting of the Ministers' Deputies, and its Appendix; Parliamentary Assembly Recommendation no. 1203 (1993) on Gypsies in Europe; Parliamentary Recommendation no. 1557 (2002): The legal situation of Roma in Europe; European Commission against Racism and Intolerance (ECRI) general policy recommendation no. 3: Combating racism and intolerance against Roma/Gypsies (1998); ECRI general policy recommendation no. 7 on national legislation to combat racism and racial discrimination (2002); ECRI's report on the Czech Republic from 1997, 2000 and 2004; the Framework Convention for the Protection of National Minorities, as well as the report submitted by the Czech Republic in 2004 and the Advisory Committee's Opinion of 2002 and 2005; finally, the Final Report of the Commissioner for Human Rights on the Human-Rights Situation of the Roma, Sinti and Travellers in Europe (2006).

54. Article 13; Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination; Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Case 152-73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, 12 February 1974; Case 170-84 *Bilka Kaufhaus v. Karin Weber von Hartz*, 13 May 1986; C-167/97 *Regina v. Secretary of State for Employment*, ex parte *Nicole Seymour-Smith and Laura Perez*, 9 February 1999; C-5/02 *Hilde Schönheit v. Stadt Frankfurt am Main/Silvia Becker v. Land Hessen*, 23 October 2003; C-256/01 *Debra Allonby v. Accrington & Rossendale College and Others*, 13 January 2004; C-147/03 *Commission v. Austria*, 7 July 2005.

55. ICCPR and General Comment 18 from the Human Rights Committee as well as their Communication regarding the Czech Republic of 1995; ICERD and its Committee's General Recommendation 14, 19, and 27, as well as its concluding observations on the Czech Republic of 1998; CRC; the UNESCO Convention Against Discrimination in Education; and the Declaration on Race and Racial Prejudice adopted by the UNESCO General Conference of 27 November 1978.

56. Information from the website of the European Union Agency for Fundamental Rights on the Czech Republic; the House of Lords decision in *Regina v. Immigration Office at Prague Airport and another*, ex parte *ERRC and others*; and US Supreme Court's ruling in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

57. In *O'Flynn*, the ECJ rejected the UK government's contention that statistics were necessary to establish any case of indirect discrimination. *O'Flynn* C-237/94 [1996] ECR I-02617, para. 21; also *D.H. and Others*, GC, para. 188.

58. For further development of this line, see Lilla Farkas, 'The Scene After Battle: What is the Victory in *D.H.* Worth and Where to Go From Here?' (2008) 1 *Roma Rights Journal* 51.

59. Dissenting Opinion of Judge Jungwiert, para. 2.

60. See *Handyside v. the UK* A24 (1976), paras 48-49; also *Engel v. the Netherlands* A22 (1976), para. 22. For consideration of the broader doctrine of the margin of appreciation of which this forms part, see D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), 12-15.

61. Grand Chamber ruling, para. 45.

a much contested subject among academics, despite the official endorsement of the thesis of Indian origins⁶² –, to examinations of a wide range of international and European monitoring bodies. Such delving into the historical and contemporary situation of Romani communities brought the Court to the assessment that, ‘as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority’.⁶³ This assessment led to the somewhat startling conclusion for a Court, that because the practice of special schools had ‘a disproportionately prejudicial effect on the Roma community ... it does not need to examine their [the applicants’] individual cases’.⁶⁴

The danger with the Court’s decision to abandon a judicial role is that it risks turning itself into, as Judge Borrego Borrego commented, a second European Commission against Racism and Intolerance (ECRI), or any other of the many monitoring bodies that examine the social context of racism and the well-being of minority groups within Europe. The obvious point is that the Court is indeed – as it has always highlighted itself – not best placed to carry out social assessments of the extent of marginalisation or deprivation of given minorities or, more broadly put, the facts of given cases; it does not have the time or the capacity to weigh up controversial historical and sociological evidence and reach nuanced conclusions. The reports upon which the Court relied are frequently based upon second or third hand information and are very general in nature, often reporting on the situation in ‘Central and Eastern Europe’ or in ‘Europe’ as a whole. These reports do not allow the Court to make an assessment of the situation in the Czech Republic at the time period covered by the applications with any degree of accuracy; nor do they tell the Court anything about the situation of the given applicants.

And yet, if the Court is to develop a fuller and more context-based approach to difference in treatment, it needs to make some kind of assessment of the particular and separate needs of a given group (to which the applicant belongs) in order to determine whether treating like alike itself constitutes discrimination in that particular case. Where this is a minority group, assessment of whether and what particular needs exist and pertain to the situation will require some sort of historical, cultural and sociological examination. Given that, Judge Borrego Borrego’s dissent misses its target. However, in attempting to demonstrate how aware it was of the problems facing Romani communities and how much it really did

care, despite the impression given by the Second Section, the Court made itself a hostage to the details.⁶⁵ In future, it would be advisable to minimise the extent to which it delves into such issues, and unless information is strictly relevant to understanding the situation from which the application stems, one can only think that the Court would be better off to exclude it from its formal reasoning.

However, there is a more fundamental criticism of the Court’s explicit abandoning of its judicial role and that concerns the denial of individual justice.⁶⁶ In dismissing the need to consider the individual applicants, the Court is clearly stating that it could have been any Romani child as applicant and the finding would have been the same. The outcome of such a dismissal is similar to that of the Czech schooling system: the failure to see the individual child in all his or her glory, his or her particular needs, and to lump all together on the basis of their ethnicity. This is not to say that the Court should have taken the step of arranging alternative psychological testing of each applicant in order to determine whether or not they were correctly placed in a special school but to note that the Court appeared to have been a little carried away in its own momentum to the point where it explicitly denied the individual’s relevance in the proceedings.

Moreover, the failure of the GC to see the individual child is accentuated by the complete absence in the Court’s reasoning of the harm done to misplaced children who pass through the special schooling system. Nowhere in the judgement proper did the Court consider the consequences of the vastly inferior education on offer for the life chances of the children affected, and hence their ability to play a meaningful role in the social and economic life of society; nor did the Court consider the irreparable psychological harm that is likely to result from branding young children as mentally deficient or the harm that results from the failure to create a multi-cultural environment in which all children can learn to live together. The only point at which the Court appears to consider the claims of the applicants’ lawyers of ‘educational, psychological and emotional harm’ is in deciding the amount of non-pecuniary damages it will award each applicant. The Court held that it was ‘clear’ that the children had sustained non-pecuniary damage for the frustration and humiliation of the discrimination that they had faced, and decided to award EUR 4000 per child. Even considering just the loss of future earnings that results from the derisory education suffered, the amount

62. See in this regard, A. Fraser, *The Gypsies*. Oxford: Blackstone Press, 1992 (still the best introduction); but also L. Lucassen, W. Willems and A. Cottaar (eds.), *Gypsies and Other Itinerant Groups*. Great Britain: Macmillan, 1998; and W. Willems, *In Search of the True Gypsy. From Enlightenment to Final Solution*. London: Frank Cass, 1997.

63. Grand Chamber decision, para. 182 (also cited by Judge Borrego Borrego in his dissent, para. 5).

64. Ibid., para. 209.

65. For example, Judge Jungwiert’s criticism that the historical information upon which the Court relied was ‘inaccurate, inadequate and of a very general nature’ (para. 3); for example, he highlights the Court’s hedging on the Romani experience during the Nazi occupation of what are now the Czech territories, describing it as an ‘attempted extermination’, whereas historical records show it to have been an almost total annihilation (para. 4).

66. Another discussion has taken place on this point on a Czech specialist internet server ‘Different Law’, concerning whether or not the government would have been able to rebut the presumption of discrimination by demonstrating that one of the children was in fact mentally disabled. See David Strupek, ‘Before and After the Ostrava Case: Lessons for Anti-Discrimination Law and Litigation in the Czech Republic’ (2008) 1 *Roma Rights Journal* 41. Strupek represented the applicants in the case.

of EUR 4000 seems woeful. The applicants' lawyers, in contrast, received EUR 10,000 for their time and expenses.⁶⁷

The failure to deal adequately with the harm to the individual child that results both from a woefully inferior education and from the fact of racial segregation itself sees the Court unwilling to label the consequences of such systemic discrimination as segregation and to condemn it. In a case concerning the *de facto* segregation of ethnic minority children into schools for the mentally inferior, the word segregation is not even mentioned once. The Court denied itself the opportunity to echo the US Supreme Court in declaring that segregation *per se* is invariably evil.

342 The issue of consent

A further criticism concerns the Court's characterisation of Romani parents in dealing with the issue of consent. In attempting to sidestep the thorny detail that the applicants' parents had consented to their placement in a special school, the Court decided that instead of blaming the parents it would excuse them on grounds of incapacity. The Court noted that because the parents were 'members of a disadvantaged community and often poorly educated', it was not satisfied that they 'were capable of weighing up all the aspects of the situation' and the consequences thereof.⁶⁸ There are a number of dangers with this approach. The first is that it appears to assume that no Romani parents are capable of deciding what is in their child's best interest; the best interests of a child are not a neutral given but are culturally specific and there are real dangers to the Court assuming that it can fulfil that role in place of the parents. Secondly, the assumption of incapacity of the parents can be seen as feeding into and sustaining a paternalistic attitude towards Roma and thus is arguably part and parcel of the discrimination that the Court so readily condemns. Moreover, it is of a similar type of argument as that which saw thousands of minority children removed from their parents in many countries around the world, whether aboriginal children taken from their families in Canada and Australia, or the common policy of removing Romani children under Communism in many of the countries of Central and Eastern Europe.

Further, the Court went on to state that in any case, the parents were not capable of waiving the right not to be subject to racial discrimination on behalf of their child; the public interest in tackling racial discrimination thus outweighed the parents' right to take decisions on behalf of their child. While the recognition of the destructive power of racial discrimination to the fabric of society is again to be welcomed, and while not denying the difficulty of fashioning a foolproof argument that recognises the public interest in such cases, there is something worrisome in the Court's apparent approach that we all know

racial discrimination when we see it, at which moments consent of the alleged victim becomes irrelevant. Diagnosing discrimination is not always so straight-forward.

One simple and uncontroversial way to approach the issue of parental consent would have been to assert that a child's right to education is so fundamental that it cannot be waived by parental consent.⁶⁹ Moreover this approach would have allowed the Court to stress not only the vital importance of education but the importance of a multicultural education as the foundation of our increasingly diverse societies.

Alternatively, the Court could have noted the choices that Romani parents are too frequently faced with: that of sending their children through the gauntlet of a normal school system that is rife with anti-Romani prejudice and harassment from fellow pupils, other parents and teachers, or of ensuring that their child at least had a safe environment in which to learn the basics of an education. Similarly, special schools can be attractive to Romani parents, where the schools are residential institutions, for the hot meals and accommodation that they provide, and which the normal school system does not. Thus, parents who consent to send their children to special school may make the choice to provide their children with shelter and a warm meal that they are themselves unable to provide. Had the Court chosen to focus on the terrible dilemma facing many Romani parents, between that of security and sustenance for their children and a normal education, the Court could have highlighted the multi-faceted nature of exclusion that Romani communities face; and in so doing acknowledge the often impossible choice given Romani parents by the very systemic discrimination that the case was challenging.

But instead of powerful statements on the vital importance of an education of equality among their peers drawn from all the groups that make up society, the Court chose to rule that parents of marginalized minority groups are incapable of giving consent. Where *Brown v. Board*'s vision of the place of all children, regardless of race, in American society is empowering, the Court in *D.H. and Others* is at risk of infantilizing all Romani parents in a broad and sweeping denial of their ability to be proper parents.

In sum, the Court failed to deliver a judgment of the moral stature of *Brown v. Board of Education* precisely because it took too great a leap into a contextual approach to understanding differential treatment – necessary in order to move towards meaningful equality and hence to be welcomed; yet in doing so, it appeared to lose sight of the individual applicants stood before it asking for justice. In order to have risen to the moral significance of the Supreme Court's ruling in 1954, the European Court needed to have focused on the individual, explicitly

67. Although the Court traditionally does not award high damages – deeming judgment to be satisfaction enough – for the sake of comparison, it recently awarded an 85-year old man 30,000 euros in non-pecuniary damages for the suffering inflicted in a prosecution for alleged war crimes dating from the Second World War, in violation of Article 7. *Kononov v. Latvia*, judgment of 24 July 2008.

68. Grand Chamber ruling, para. 203.

69. See Goodwin, *op. cit.* n. 26.

seeing the individual child – their thwarted hopes, desires and potentialities – as well as the importance of that child to her own community and the wider society. The Court needed to have stressed the value of education in achieving the diverse democratic society that the Convention is charged with protecting and fulfilling, and hence of *educational* segregation as one of the most harmful practices at work in Europe today. It did none of these things.

4. The follow-up cases

The Court was given the opportunity to follow up on *D.H. and Others* as cases already in the pipeline looked to benefit from that enthusiastic decision. *Sampanis and Others v. Greece*,⁷⁰ decided on 15th June 2008, concerned first the failure of local school authorities to enrol Romani children at two primary schools and the subsequent decision to place those children in separate facilities following sustained protests from non-Romani parents against the placement of Romani children in classes alongside their children. A month later, in *Oršuš and Others v. Croatia*,⁷¹ the applicants brought a claim more straightforwardly similar to that in *Ostrava*, namely that Romani children were segregated from the mainstream, in this case into separate classes within the normal school system on their basis of their ethnicity.

The ruling in *Sampanis* is available only in French, an odd fact given the importance of the subject matter. There were two issues at stake in this case: the first, the failure by school headteachers to enrol the applicants for the school year 2004-2005 despite attempts by their parents to do so; and secondly, the creation of preparatory classes solely for Romani children in separate facilities within the school premises. On the first issue, the Court took the opportunity again to elaborate on the positive obligations of the state towards a vulnerable group such as the Roma. Although the authorities had not explicitly refused to enrol Romani children, the obligation was on the state – even where, as was the government’s explanation, the authorities believed that the parents were only seeking information about enrolment and not actually seeking to enrol the children – to give ‘particular attention to their needs’ and to facilitate the children’s enrolment. Thus, Article 14 requires state parties to recognise the needs of members of vulnerable communities, by which they should, in practice, treat such individuals differently.

As regards the second issue of separate classes, the Court considered in detail the government’s claim that the classes were necessary to prepare Romani pupils, because of their having missed a year of school, to enter ordinary classes. Separating out the fact of separate classes from the demonstrations by non-Romani parents that preceded their establishment, the Court highlighted that the government had not put forward any examples of children, in the two years in which the applicants were taught in separate classes, who were subsequently admitted into the ordinary class system. Moreover, there appeared to

be no formal system of assessment in order to establish on an objective basis the ability of these children to follow the ordinary class curriculum. This alone was sufficient for the Chamber to find a violation of Article 14 in conjunction with Article 2 Protocol No. 1.

More importantly for the present assessment, in stressing the importance of an appropriate system capable of assessing objectively the capabilities of children and of monitoring their progress, the Court emphasised the importance of the appearance of objectivity in cases where those affected are children of ethnic minorities. The suggestion that state parties should seek to avoid that children and their parents understand their separation from the mainstream as being the result of racial prejudice indicates an awareness of the psychological harm resulting from segregation – an issue barely touched upon by the Court in *Ostrava*. Yet in doing so here, the Court links the need to avoid the appearance of segregation to the racist actions of the non-Romani parents. This linking means that it is not clear whether, in the absence of racially prejudicial actions by any of the actors involved in the factual situation forming the basis of the case, the Court would consider the psychological element as relevant i.e. unless there was good reason for those affected to believe the differential treatment that they receive to be racially-motivated, the Court would not give weight to it. Only further case-law will tell.

Yet, despite again finding in the applicant’s favour, the Court avoided making a comprehensive statement condemning segregation. Moreover, it failed to follow through on its recognition of the psychological impact of segregation and establish as principle that it is not the quality of the alternative curriculum or the state of upkeep of the separate school buildings but the impact of separation itself on the minds of the children – both minority and majority – that makes segregation so awful, despite an excellent opportunity to do so.

Moreover, the Court unfortunately repeated the Grand Chamber’s finding in *Ostrava*, that the consent of the parents – again, as ‘members of an underprivileged and often uneducated community’ – to the placement of their children in separate classes was invalid, as they would not have been able to assess all the aspects of the situation and the consequences thereof.

The case of *Oršuš* saw the Court give content to what an objective assessment system might look like. The Court expressly rejected the applicants’ claim of a parallel between their situation and that of the children from *Ostrava*, accepting instead that a lack of sufficient knowledge of the Croatian language by the applicants constituted an objective justification. Moreover, the decision of the authorities to place the separate classes within the ordinary schooling system and to facilitate transfer of children from the separate classes to the normal mixed classes meant their actions fell within the bounds of proportionality; in contrast to the Greek authorities, the Croatian

70. *Sampanis v. Greece*, judgment of 15 June 2008.

71. *Oršuš and Others v. Croatia*, judgment of 17th July 2008; referred to the Grand Chamber on 1 December 2008.

government provided evidence of the regular transfer of children from a separate class to the mainstream. The decision of the Court to accept the government's justifications came despite the fact that the applicants' language ability was not assessed upon enrolment and despite the lack of established criteria for assessing when a child should be transferred into the mainstream, with the system relying entirely upon the judgment of individual teachers.⁷²

The difficulty with accepting insufficiency in the language of instruction as justification for a difference in treatment – even where assessment is objective and transferral possible – is that it again fails to address the issue of separation as an evil in itself. The Court did not deny that the system affected Romani children overwhelmingly, although it did note that in the three schools at issue only 73%, 36% and 26% of Romani pupils at those schools were placed in separate classes,⁷³ and it appears to mention in passing that the existence of separate classes occurs only in four of the elementary schools in the entire region, *because* it is an area of high Romani concentration. The evidence does appear to suggest that separate classes were created especially for Romani children.

Oršuš is interesting in addition because the applicants endeavoured to force the Court to address the issue of psychological harm. By making a claim under Article 3, the applicants attempted to make the case that although they were not condemned to schools for the mentally-disabled, were not placed in special classes by ethnically significant margins, and, moreover, accepting the assessment of the deficiency of their Croatian, the fact of separation itself for the children concerned was so harmful that it engaged the liability of the State. The applicants claimed that segregation from non-Romani children constituted inhuman and degrading treatment because of the educational, emotional and psychological harm that it caused. To make their case, the applicants submitted a report of a psychological study of children in Roma-only classes from a county in Croatia that stated conclusively that the placement of children in segregated classes, whatever the purpose for doing so, led to feelings of lower self-esteem, of self-respect and caused problems in the development of the children's identity; in addition, the report found that the children themselves stated by an overwhelming margin that they did not wish to be separated from non-Romani children, that they did not have any non-Romani friends, would like to, and that they felt unaccepted in the school environment.⁷⁴

The applicants were unsuccessful. In response, the Court noted that although it did not rule out that discriminatory segregation in the field of education could cross the threshold of Article 3 – not a move of any significance given the Court's earlier findings that racial discrimination can and has breached Article 3⁷⁵ – no evidence had

been presented to suggest that separation in a special class had caused any harm to any of the *individual* applicants. Whereas in *D.H.*, the Grand Chamber opted to focus not on the individual applicants but on the system as a whole, in *Oršuš*, the Court's assessment of the impact and needs of the applicants in the case at hand takes centre stage. *Oršuš* thus appears to be a retreat from the excesses of *D.H. and Others*.

The cases of *Sampanis* and *Oršuš* sees the Court struggling with the implications of systemic discrimination and the extent to which it can be expected to provide a remedy against a general claim against the system. The rulings suggest that the Court is moving towards a set of standards that any system of education that separates ethnic minority children from the mainstream must meet; and it is not a particularly rigorous one. It does not require, for example, clearly defined standards or guidelines for when a child has met the threshold for transferral to the mainstream but is willing to accept the discretionary judgment of individual teachers; it does not require that all efforts be made to house separate classes, where they are shown to be necessary, in the same physical space as ordinary classes in order to minimise the impact on the multicultural atmosphere and on the psychological well-being of those children separated out from the mainstream. Indeed, the Court remains apparently unconvinced that separation or segregation into Roma-only classes causes psychological harm *per se*.

5. Conclusions

This paper began by asking whether the Grand Chamber's ruling in *D.H. and Others* constituted a *Brown v. Board of Education* moment for the Strasbourg Court. The short answer is that the Court fell short of greatness, but not for want of trying or for a failure to recognise the significance of the opportunity presented to them. This of course makes their falling short all the more disappointing once the initial euphoria of the finding had faded. However, the Court did at last bring their jurisprudence into line with that of the European Court of Justice, weaving together a single European normative framework, and with international non-discrimination norms. This is no small step and that the Court has at last done so is hugely to be welcomed. It is to be hoped that the Court does not allow the ECJ to advance ahead of it again into difficult terrain. Moreover, the effort the Court made to contextualise the claims before it goes a long way towards acknowledging the societal responsibility we bear within our own national settings for the continuing exclusion of Romani communities. That this has been done by various monitoring bodies at both the European and international level does not detract from the significance of the Court adding its powerful voice to the chorus. The realisation of our collective responsibility is necessary if we are to be able to move towards meaningful equality

72. For a case comment by the ERRC lawyer responsible for the case, Anita Danko, 'The European Court of Human Rights Missed the Opportunity to Recognise that Segregation in Education can also take place in Mainstream Schools' (2008) 1 *Roma Rights Journal* 75.

73. *Oršuš and others v. Croatia*, para. 67.

74. *Oršuš and others v. Croatia*, para. 22.

75. E.g. in the *East African Asians* case, *op. cit.* n. 2.

and prevent the patterns of discrimination and exclusion from being always repeated.

And yet, the authority of the Grand Chamber's ruling appears to have set the Court on a particular path, one in which the Court engages with laying out the limits within which governments can operate in separating out pupils from one another on racial lines without having acknowledged the implicit dangers inherent in such separation. This is important because the cases discussed in this article touch upon essential issues beyond the ethnic community directly affected, such as that of how increasingly multicultural societies can organise a schooling system that meets the needs of all. The issue of organising education in an increasingly multicultural Europe, in which children appear to diverge significantly on ability along ethnic lines already by entry to the schooling system, suggests that a clear understanding of these dangers and how to balance the needs of certain groups without damaging the self-esteem of already vulnerable children.

The protests by the non-Romani parents and the incidents of racist behaviour by those parents towards Romani children entering the school in *Sampanis* suggest how difficult de-segregation can be for even willing governments. Yet this connection back to the broader prejudicial attitude of society is the reason why the Court needed to make a strong and ambiguous statement condemning segregation. It is the role of the European Court of Human Rights to elucidate and promulgate shared values and principles, helping us define who and what we are as Europeans. That the Court was unwilling to condemn racial segregation in education does not say good things about who we Europeans are. What was to be expected from the Court is a statement of the fundamental importance of every child and of the vital importance of equality in access to education in giving meaning to that statement.

The Grand Chamber's judgment is thus ultimately disappointing. On the one hand, the Court has gone to great lengths in its desire to exorcise the shame of the Chamber decision and find for the applicants. Yet on the other, the clumsy manner in which it did so saw the opportunity to condemn segregation missed. Moreover, in getting carried away in the need to make a strong declaration of principle, the Court made the wrong statement: they devalued the individual and infantilized the parents. The over-turning of the Chamber decision, while welcome, has thus not been without its costs.